UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WILLIAM BLACK,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 91-184 B***
	)	
LOUIS W. SULLIVAN, M.D., in his capacity as Secretary of Health and Human Services,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION [1]

This Step Three Social Security Disability appeal raises the question whether the Secretary failed to obtain a medical opinion needed to determine if the plaintiff's back problem equals any impairment listed in the Secretary's regulations.[2]

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[1] This action is properly brought under 42 U.S.C. ' 405(g). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on February 26, 1992 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

[2] The Listing of Impairments, Appendix 1, Subpart P, Part 404, describes physical and mental impairments in terms of specific medical criteria and functional limitations. If an impairment or combination of impairments meets or is deemed equivalent to those listing requirements, then it is considered to be disabling regardless of age, education or work experience. 20 C.F.R. ' ' 404.1520(d), 404.1525(c).

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff did not engage in substantial gainful activity from May 5, 1983 through April 14, 1988 nor since November 30, 1988 and that he met disability insured status requirements as of May 4, 1983, the date of the alleged onset of his disability, through at least June 30, 1989, Findings 1-2, Record p. 20; that he ``has severe lumbar spondylolisthesis, low back sprain, and status post-chemonucleolysis and lumbar fusion," but that he does not suffer from any impairment or combination of impairments that meets or equals any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. ' 404, Finding 3, Record p. 20; that his ``allegations concerning his impairments and their impact on his ability to work are not entirely credible," Finding 4, Record p. 21; that he cannot lift and carry heavy objects, stand and walk for prolonged periods or perform any other strenuous activities, but that ``he can sit for vocationally meaningful periods of time," Finding 5, Record p. 21; that he is unable to perform his past relevant work, Finding 6, Record p. 21; that he has the residual functional capacity to perform the full range of sedentary work, Finding 7, Record p. 21; that the Medical-Vocational Guidelines of Appendix 2 to Subpart P, 20 C.F.R. ' 404 (the ``Grid") direct a finding of not disabled, Finding 11, Record p. 21; and that, accordingly, the plaintiff was not disabled at any time through June 30, 1989, the date his insured status expired, or up to the date of the decision, Finding 12, Record p. 21. The Appeals Council declined to review the decision,[3] Record pp. 6-7, making it the final determination of the Secretary. 20 C.F.R. ' 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

[3] In doing so, the Appeals Council found the plaintiff's contentions -- raised by counsel in letters dated September 27, 1990 and May 8, 1991 and which are the subject of this appeal -- do not provide a basis for changing the Administrative Law Judge's opinion. Record p. 6; *see id.* pp. 8, 12.

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. ' 405(g); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Step Three Evaluation

The plaintiff has the burden of proving that his impairment, alone or in combination with others, meets or equals a listed impairment by providing relevant medical evidence. *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). In order to determine equivalency the Secretary ``will also consider the medical opinion given by one or more medical or psychological consultants designated by the Secretary in deciding medical equivalence." 20 C.F.R. ' 404.1526(b).

Social Security Ruling 83-19 makes clear that, for this purpose, the Administrative Law Judge may rely on the medical opinion of state agency physicians who have considered equivalency at the initial and reconsideration levels.[4] Social Security Ruling 83-19, reprinted in *West's Social Security Reporting Service* at 93 (Supp. 1991). A medical determination of no equivalency is indicated by the presence in the record of a physician's signature on a SSA-831-U5/SSA-833-U5 form in which the plaintiff is deemed not disabled. *Id.* Social Security Ruling 83-19 also details the only circumstances

[4] As a general proposition the Court of Appeals for the First Circuit has unequivocally rejected assertions that ``the Secretary should have arranged for testimony by a medical advisor . . .," stating that ``[u]se of a medical advisor in appropriate cases is a matter left to the Secretary's discretion; nothing in the Act or regulations requires it." *Rodriguez Pagan v. Secretary of Health & Human Servs.*,

under which an administrative law judge must secure ``an updated medical judgment" from a designated physician:

> 1. When no additional medical evidence is received, but, in the opinion of the [administrative law judge], the symptoms, signs, and laboratory findings reported in the record suggest that a judgment of equivalency may be reasonable.
>
> 2. When additional evidence is received which, in the opinion of the [administrative law judge], may change the determination of the SSA-831-U5/SSA-833-U5 that the impairment(s) does not equal the listing.

Id.

The Administrative Law Judge evaluated the plaintiff's impairments to determine whether singly or in combination they met or equaled any one of the listed impairments. Record p. 17. Noting the criteria for meeting the relevant listing and making reference to the pertinent findings of several medical examinations of the plaintiff that are reported in the record, he found no medical evidence that the plaintiff met a listed impairment --a finding that the plaintiff does not dispute. *Id.* The Administrative Law Judge also found, without discussion, that the plaintiff's condition did not equal any listed impairment, Finding 3, Record p. 20. In the case at bar, the record shows that two physicians, H.R. Hornberger, M.D., and Philip Good, M.D., made findings of no equivalency, as indicated by their signatures on separate SSA-831-U5 forms. Record pp. 54, 61.

The plaintiff asserts that an equivalency determination can only be made once the Secretary has received a medical opinion from a designated physician directly on the issue. The plaintiff is correct. However, it is clear that the opinions of state agency physicians, such as those of Dr. Hornberger and Dr. Good, satisfy the requirement of Social Security Ruling 83-19 that the Secretary receive a medical judgment as to equivalency. *Farrell v. Sullivan*, 878 F.2d 985, 990 (7th Cir. 1989). The plaintiff has failed to show that, based on the evidence in the record, the Secretary was required to secure an updated medical judgment in order to comply with Social Security Ruling 83-19. Accordingly, I find that the Secretary's conclusion regarding equivalency is based on substantial evidence.

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819 F.2d 1, 5 (1st Cir. 1987) (citing *Perales*, 402 U.S. at 408), *cert. denied*, 484 U.S. 1012 (1988).

Conclusion

For the foregoing reasons, I recommend that the Secretary's decision be ***AFFIRMED***.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 8th day of June, 1992.

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David M. Cohen
United States Magistrate Judge